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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC.; THE WATERLOO DISTILLING CORPORATION ET AL.

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF BONDHOLDERS' COMMITTEE AS AMICUS CURIAE URGING ISSUANCE OF THE WRIT.

WILLIAM E. LEAHY,
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Counsel for Bondholders' Committee.

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STATEMENT.

Although holders of bonds of the Waterloo Distilling Corporation, petitioner herein, were not made

parties to the proceeding, nevertheless their interests will be vitally affected by the decision herein. If the petition is denied the result will be to wipe out completely the interests of these stockholders. The bondholders feel that both upon the law and the facts, the petition should be granted, and to that end submit herewith this memorandum.

POINT I.

The Decision of This Court in Campbell v. Long & Company, Nos. 445, 510 and 511, October Term, 1929, Dated Maly 26, 1930, Subsequent to the Decision of the Court Below Herein, Holding That "Denatured Alcohol, However Treated, Is Not Fit for Beverage Purposes," Vitally Affects the Case Herein.

The forfeiture herein is the result of a claim on the part of the Government that the Waterloo Distilling Corporation carried on the business of a distiller with intent to defraud the United States of the tax on distilled spirits provided for by Section 600-a-4, as amended, of the Revenue Act of 1918. This section provides for a tax of $6.40 per gallon "on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage."

It would seem from a mere reading of this section that a prerequisite to its application and to the forfeiture provisions of Sections 3257 R. S. and 3281 R. S., would be the fact that the article in this case, i.e., specially denatured alcohol, was or could be fit for beverage purposes. However, this Court, in *Camp-*

bell v. Long & Company, Inc., No. 445, October Term, 1929 (May 26, 1930), specifically held that "denatured alcohol, however treated, is not fit for beverage purposes."

This Court further held that denatured alcohol, during its manufacture and preparation for the market, was not "liquor."

As opposed to the decision of this Court in the *Long Case, supra,* above quoted, the Court below held that although the alcohol alleged to have been diverted was not pure alcohol, and stated that it was specially denatured at the time of diversion, it held that it could later on be "cleaned," i.e., the poisons extracted, and could be used for beverage purposes. The Court below held that the tax imposed by Section 600-a-4 was justified on that ground.

Obviously, this reasoning is directly contrary to the holding of this Court in the *Long Case,* that denatured alcohol is not, and cannot be made fit, for beverage purposes. There is no claim in the present case that anything other than denatured alcohol constituted the distilled spirits, tax on which is alleged to have been avoided, in violation of Section 600-a-4.

Article 88 of Regulations No. 61 of the Treasury Department defines denatured alcohol as follows:

> "Denatured alcohol is ethyl alcohol to which has been added such denaturing materials as to render the alcohol unfit for use as an intoxicating beverage."

It follows from the above that the alleged distilled spirits (the article) alleged to have been diverted in fraud of the Government tax, being specially denatured alcohol, were not and never could be the subject of

tax as provided in Section 600-a-4 as amended. As no tax could be legally levied on denatured alcohol, it follows that the forfeiture proceeding based upon the claim that such a tax was due, was likewise illegal.

POINT II.

The Present Case Is on All Fours with the La Franca Case in Which This Court Granted Certiorari at the Last Term.

This Court granted a writ of certiorari in the case of *La Franca v. United States* on May 5, 1930. The question there involved was whether a criminal prosecution under the National Prohibition Act prevented the Government from assessing a penalty for violation of the Prohibition Act under Section 3244 R. S., as amended. The Circuit Court of Appeals for the Fifth Circuit held that a penalty imposed for criminal misconduct was punitive even though enforceable by civil proceeding and that conviction or acquittal in a criminal case involving the same subject matter barred further prosecution civilly or criminally.

It is noted that the Government, on page 15 of its brief in opposition, attempts to distinguish the *La Franca Case* from the present case with the statement that the *La Franca Case* was a suit to recover taxes and penalties and did not involve any forfeiture proceedings.

There would seem to be no difference in principle between a penalty and a forfeiture, both being prosecutions and punitive in character. The cases are identical in that the *La Franca Case* involves a penalty, and the present case a forfeiture, both prescribed by

statutes passed prior to the passage of the National Prohibition Act. Both are within the meaning of Section 5 of the Willis-Campbell Act (27 U. S. C. A., Sec. 3), providing:

> "* * * if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to a prosecution therefor under the other."

The reasoning of the Court in the *La Franca Case* that a penalty imposed for criminal misconduct is none the less punitive by reason of the fact that it may be enforced by a proceeding civil in form, is equally applicable to a forfeiture. Both in the *La Franca Case* and in the present case the object of the forfeiture proceedings, which followed closely upon the conviction in the criminal case, was to subject the parties to additional punishment for acts for which they were convicted.

This Court has defined a forfeiture as "a punishment, in effect, for a violation of some duty enjoined upon the party by law." (*Maryland v. Baltimore R. Co.*, 3 How. 534, 11 L. Ed. 714). In *Van Buren v. Digges*, 11 How. 462, 476, 13 L. Ed. 771, this Court said:

> "The term 'forfeiture' imports a penalty. * * * It implies an absolute infliction regardless of the nature and extent of the causes by which it is superinduced."

The forfeitures in the present case were achieved by Sections 3257 R. S. and 3281 R. S. Both state in so many words that for the infraction defined, the articles

in question shall be "forfeited" to the United States.

In the present case petitioner, Waterloo Distilling Corporation, was convicted of conspiracy to violate the Prohibition Act. This was equivalent, for the purposes of the statutes here involved, to conviction of a violation of the Prohibition Act itself. The Court so held in *United States v. Goldman*, 28 Fed. (2d) 424.

CONCLUSION.

It should be of the utmost importance to the Government (there being so many cases of this nature) to know definitely whether or not a criminal conviction or acquittal is a bar to a subsequent proceeding by way of forfeiture. The Petition shoud be granted.

Respectfully submitted,

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Waterloo Distilling Corporation.